

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 2003 Session

**DONALD CAMPBELL, ET AL. v. BEDFORD COUNTY REGIONAL
PLANNING COMMISSION**

Appeal from the Circuit Court for Bedford County
No. 9185 Lee Russell, Judge

No. M2003-00025-COA-R3-CV - Filed March 29, 2004

In this declaratory judgment action, plaintiffs appeal the decision of the trial court finding that they were not operating an auto repair business on the property in question prior to the adoption of a zoning resolution of Bedford County; and were therefore not entitled relief pursuant to the “grandfather clause” exceptions in *Tennessee Code Annotated* § 13-7-208(b)-c). The plaintiffs did not seek judicial review of the Board of Zoning Appeals decision by filing a Petition for Writ of Certiorari pursuant to *Tenn. Code Ann.* § 27-9-102 within 60 days after the Board’s action. We find that this was also the applicable period of limitation for filing the declaratory judgment action which was not filed until almost 10 months after the Board’s decision. We find that this case is therefore time barred and the trial court did not have subject matter jurisdiction. We affirm the decision of the trial court for the reasons stated herein.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JAMES L. WEATHERFORD, SR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and WILLIAM B. CAIN, J., joined.

Andrew C. Rambo, Shelbyville, Tennessee, for the appellant Donald W. Campbell Jr., and wife Melissa K. Campbell.

Ginger Bobo Shofner and John T. Bobo, for the appellee Bedford County Regional Planning Commission.

OPINION

Mr. and Mrs. Donald Campbell (hereinafter the plaintiffs) have lived on a 1 acre tract located at 783 Halls Mills Road for 26 years. In addition to their full time jobs, the plaintiffs have operated a hobby or part-time body shop in their garage at this residence. They also do general contracting, electrical, plumbing, and repair work.

Two years before the county adopted a zoning resolution, the plaintiffs purchased a 7.5 acre parcel in front of their residence so that they could construct a building and expand their body shop business. They moved cars from their residence to the new property. One year prior to passage of the zoning resolution, they had cleared and leveled the land for the building site; and brought in gravel, set poles, built a roof, and poured concrete for the building.

Mr. Campbell contacted the Emergency Management Center for a business address for the property. He had business cards printed with the new address of 784 Halls Mills Road, before he learned that the Center had given him an address for the wrong side of the road. On November 1, 1996, the plaintiffs obtained a business license for Campbell's Body Shop and Plumbing. Because of the error with the new address, the address for the business license was placed at the home address. The plaintiffs also obtained tax advice, additional insurance, and a business phone for their business.

The Zoning Resolution of Bedford County became effective on January 14, 1998.¹ Prior to this date, Mr. Campbell stored cars, his plumbing truck and other machinery in the unfinished building. He also painted a horse trailer, put in an engine, and did some plumbing and masonry work from this building. In late 1997, siding was installed on the building followed by wiring lights and insulation. He then installed metal inside walls, a car lift and an air compressor. Mr. Campbell admitted he did not do any auto body work in the building until the sides were up which was not completed until after passage of the zoning resolution.

On March 2, 2001, the Bedford County Zoning Compliance Officer, Sam D. Riddle, through the County Attorney's Office issued a Notice of Zoning Violation to the plaintiffs for the placement and open storage of 15 or more inoperable of junk motor vehicles on the property. Mr. Riddle had inspected the property after receiving complaints from neighboring landowners about the accumulation of non-operable vehicles. After meeting with the plaintiffs, Officer Riddle concluded that the land in question was not grandfathered in for an auto body repair shop. The plaintiffs never presented any invoices for auto repair work. According to Mr. Riddle, he never saw any activity from which he would conclude that there was a fully functional auto repair business on the property. He also based his decision on the fact the business license was assigned to another parcel from which the plaintiffs were operating an auto body repair shop.

On August 16, 2001, the Zoning Board of Appeals of Bedford County decided:

To uphold the denial decision of the Zoning Officer & legal counsel for Donald Campbell's request of 783 Halls Mill Rd to operate an auto body repair business on Parcel 20. Parcel 20 is not grandfathered in as Parcel 26.01 is. Denial

¹The plaintiffs' property is located in an agricultural and forestry district. The landowner must apply to the Board of Zoning Appeals for a Special Exception for certain additional usages.

was based on Section 4.041 #16 due to “preserving the general character of surrounding usages.”

On September 20, 2001, the Board found that the plaintiffs could have only 3 or less non operable vehicles sitting outside at any one time on the property. The plaintiffs did not seek judicial review of the decision of the Board of Zoning Appeals.

On July 11, 2002, plaintiffs filed a complaint in circuit court alleging that they operated an automobile repair and salvage operation on the property and that business existed prior to the January 13, 1998 zoning resolution. Plaintiffs alleged that they had a vested right to an existing non-conforming use and the continued legal use of their property and should be afforded relief under *Tenn. Code Ann.* § 13-7-208(b) permitting continued use of their property and *Tenn. Code Ann.* § 13-7-208(c) permitting expansion of this operation and construction of additional facilities. Plaintiffs asked the court to enter judgment declaring: 1) their operation to be a valid non-conforming use existing prior to the zoning resolution; 2) their vested right in this non-conforming use is not subject to regulation requiring variance or use permits; and 3) that the building under construction prior to the passage of the resolution was sufficiently complete to constitute a preexisting non-conforming use.

After hearing testimony from all witnesses, the trial court found that while there was an intent to conduct and substantial money spent toward an auto repair business— the plaintiffs did not have an ongoing auto repair business² on the property in question prior to the adoption of the Zoning Resolution of Bedford County, Tennessee. The trial court found that the plaintiffs were not entitled to relief under the “grandfather clause” exceptions of *Tenn. Code Ann.* § 13-7-208(b)-c). The trial court based its ruling on its conclusion from the evidence that it was not known in the neighborhood that an automobile repair business was going on at the new premises. The trial court also found the plaintiffs were entitled to use the prefabricated metal storage building on Parcel 20 for interior storage.

The plaintiffs raise the sole issue of whether the evidence preponderates against the judgment of the trial court declaring plaintiffs’ business was not entitled to a zoning exemption as a pre-existing non-conforming use.

Although the evidence clearly established preparation and an intent to open an auto repair business on the property, the testimony at trial did not establish that the plaintiffs had an ongoing auto repair business at that location as of January 14, 1998. Mrs. Campbell testified that no automotive body repair work was done on the property in 1997. Mr. Campbell testified that no auto work was done in the building until after the side walls were up in late 1997. There was no evidence presented as to the plaintiffs’ customer base, business operation, or invoices for auto repair work in 1997. Mr. Campbell’s uncle testified that Mr. Campbell had repaired his car but wasn’t sure when the repair occurred.

²The plaintiffs dropped their claim for salvage operation at trial.

After reviewing the record in this case, we find that the evidence does not preponderate against the trial court's finding that the plaintiffs had not operated an automobile repair business on the property in question prior to the adoption of the Zoning Resolution of Bedford County. While we affirm the judgment of the trial court, we find that the preponderance of the evidence standard is not the proper standard of review for this proceeding.

In *McCallen v. City of Memphis*, 786 S.W.2d 633 (Tenn.1990), our Supreme Court reviewed the alternate procedures for judicial review of actions taken by local governing bodies. Administrative actions of the Board of Zoning Appeals include decisions that execute a zoning resolution already in existence. The proper remedy for one who seeks to overturn such a determination is the common law writ of certiorari as provided in *Tenn. Code Ann.* § 27-8-101. An action for declaratory judgment is the proper remedy for one who seeks to invalidate a resolution enacting or amending zoning legislation. *Id.* at 638-40.

In this case the action of the Board of Zoning Appeals was administrative, and therefore the proper remedy was the common law writ of certiorari. We shall therefore treat the plaintiffs' complaint as a petition for a common law writ of certiorari. *Id.* at 640.

Tennessee Code Annotated § 27-8-101 provides:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

In reviewing legislative or administrative actions of a local governmental body, the "court should refrain from substituting its judgment for the broad discretionary authority of the local governmental body. An invalidation of the action should take place only when the decision is clearly illegal, arbitrary, or capricious." *McCallen*, 786 S.W.2d at 641-42.

Tennessee Code Annotated § 13-7-208(b) provides:

In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

We find that the action of the Zoning Board of Appeals was not illegal, arbitrary, or capricious and could affirm the trial court's ruling on that basis. However, we find that the dispositive issue of this case involves the applicable period of limitations for declaratory judgment actions and common law writs of certiorari. In *Brackin v. Sumner County*, 814 S.W.2d 57, 60-61 (Tenn. 1991), our Supreme Court stated:

This issue was analyzed and determined by the court in *Dehoff v. Attorney General*, 564 S.W.2d 361 (Tenn.1978). The court held that a declaratory judgment action seeking to have a special referendum election adjudged a void election, amounted to an election contest. Consequently, the plaintiffs were bound by the applicable period of limitations in the election statutes. The trial court determined that the action, though filed as a declaratory judgment suit, was in reality an election contest and as such was required by T.C.A. § 2-1705 [§ 2-17-105], to be filed within ten (10) days following the election. Since the action was not filed within that period of time, plaintiff's suit was dismissed. This Court affirmed the judgment holding that limitation statutes do not apply to declaratory judgment suits, as such, because a declaratory judgment action is a mere procedural device by which various types of substantive claims may be asserted.

Brackin v. Sumner County, 814 S.W.2d 57, 60-61 (Tenn. 1991).

In *Kielbasa v. B & H Rentals, LLC*, No. M2002-00129-COA-R3-CV, 2003 Tenn. App. LEXIS 389 (Tenn.Ct.App. May 22, 2003)(No Tenn.R.App.P. 11 application filed), this court held that a declaratory judgment action that challenged a decision of a board of zoning appeals was governed by the statute of limitations for common-law writs of certiorari.

The plaintiffs did not seek judicial review of the Board of Zoning Appeals' decision by filing a Petition for Writ of Certiorari within 60 days after the Board's action pursuant to *Tenn. Code Ann.* § 27-9-102 thus depriving the court of subject matter jurisdiction. *Thandiwe v. Traugher*, 909 S.W.2d 802, 804 (Tenn.Ct.App.1994). The relief sought in the declaratory judgment action is the same relief that was available had they filed a Petition for Writ of Certiorari.

Although this statute of limitations issue was not raised at the trial court level, it was discussed at oral argument before this Court. *Tenn. R. App. P.* 13(b)³ and 36(a)⁴ gave this court

³*Tenn. R. App. P.* 13(b) provides: "Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process."

⁴*Tenn. R. App. P.* 36(a) provides: "The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any
(continued...)"

discretion to consider issues not raised in the trial court to achieve fairness and justice. *Heatherly v. Merrimack Mutual Fire Insurance Co.*, 43 S.W.3d 911, 915-16 (Tenn. Ct. App. 2000). We find that the declaratory judgment action was time barred and the trial court was without subject matter jurisdiction to hear the case.

CONCLUSION

The judgment of the trial court is affirmed for the reasons stated herein. Costs are taxed to the appellant.

JAMES L. WEATHERFORD, SR.J.

⁴(...continued)

relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact.”